Petition

81-282

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No. .....

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

BEVERLY LAWRENCE,

Petitioner,

vs.

CREDITHRIFT OF AMERICA, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

JOSEPH H. KING, JR.
Attorney for Petitioner

967 Juniper Street, N.E.
Atlanta, Georgia 30309
(404) 881-1700

QUESTION PRESENTED.

Is a successful plaintiff in a Truth--in-Lending action, who must defeat a meritless state law counterclaim in order to prevail, entitled to attorney's fees for the time spent litigating the counterclaim?

LIST OF PARTIES.

Beverly Lawrence (also known as Mrs. James Lawrence), Plaintiff-Appellant;

Credithrift of America, Inc., Defendant-Appellee.

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Petitioner, Beverly Lawrence, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW.

The en banc opinion of the Court of Appeals, affirming the trial court by an evenly divided vote, is reported at 644 F.2d 506. The original panel opinion is reported at 622 F.2d 1207, and the order of the Court of Appeals granting rehearing en banc is reported at 628 F.2d 931. None of the pertinent district court opinions is reported.

These opinions are reproduced, in inverse chronological order, in the appendix to this petition.

JURISDICTION.

The judgment of the panel of the Court of Appeals was rendered on August 4, 1980 (in petitioner's favor). The respondent filed a petition forehearing en banc, which was granted by the Court of Appeals on October 7, 1980. On May 8, 1981, the Court of Appeals entered its final judgment en banc, affirming the trial court by an evenly divided vote. This petition was filed within 90 days of that date. Jurisdiction of this Court is invoked

pursuant to 28 U.S.C. §1254(1). The basis of jurisdiction in the district court was 15 U.S.C. §1601, et seq.

STATUTORY PROVISIONS INVOLVED.

15 U.S.C. §1640(a):

> "Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person in an amount equal to the sum of --
>
> [a described principal amount] and
>
> "(3) In the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court."

STATEMENT OF THE CASE.

Beverly Lawrence and her husband entered into a consumer loan transaction with Credithrift on November 11, 1975; it imposed a finance charge of $342.65, but

did not comply with the disclosure requirements of the Truth-in-Lending Act. She sued for statutory damages of $685.30, plus reasonable attorney's fees, as provided by the Statute. Credithrift answered, denying liability, but later amended its answer to counterclaim for $1,384.37 allegedly due on the loan contract.

The district court determined that the counterclaim was meritless, because the loan was illegal under the applicable Georgia usury statute. It awarded Mrs. Lawrence $100.00 principal, plus partial attorney's fees; it refused, however, to award any fee for the time spent defeating the meritless counterclaim.

Beverly Lawrence appealed. She argued that the principal amount should have been the $685.30 she sued for, that she was entitled to certain post-judgment interest, and that she should have been awarded attorney's fees for all of the "action."

The Fifth Circuit panel agreed on all counts, and reversed the judgment below. Credithrift moved for rehearing en banc as to the attorney's fees issue only, and

the matter was resubmitted to all 24 qualified judges. The full bench was evenly divided; the trial court was therefore affirmed without opinion as to the attorney's fee issue.

REASONS FOR GRANTING THE WRIT.

It is important to grant the writ because (1) the ruling below clashes with the principles enunciated in New York Gaslight Club, Inc. v. Carey, _____U.S. _____, 100 S.Ct. 2024 (1980); (2) the inability of the present Fifth Circuit to decide this issue (which it considered important enough to hear en banc) means that there is an inchoate split between the new Fifth and Eleventh Circuits; (3) the ultimate ruling below is in direct conflict with a decision of the Tenth Circuit; and (4) this problem, while it arose in the context of a Truth-in-Lending case, exists potentially in connection with dozens of federal statutes which provide for attorney's fees to encourage public interest litigation by private attorneys general.

I.
INTRODUCTORY STATEMENT.

The Truth-in-Lending Act is one of many federal laws whose enforcement Congress has left, at least in part, to private

attorneys general. The TILA contains a typical enforcement mechanism: the individual affected by the violation of federal law is given a private right of action, which includes an award of attorney's fees. One writer enumerated some 70 separate federal statutes containing such provisions; see Samuel R. Berger, Court Awarded Attorney's Fees: What is "Reasonable"?, 126 U.Pa. L. Rev. 251, 303 - 304 (note 104). The courts of appeals have recognized that certain general principles can be applied to statutory fee awards in all such cases. Thus, the Fifth Circuit has enumerated certain factors in Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir., 1974) (Title VII) which are also considered to be applicable to Truth-in-Lending litigation (see McGowan v. Credit Center of North Jackson, Inc., 546 F.2d 73 (5th Cir., 1977)), as well as civil rights litigation, antitrust litigation, etc. So the principle at issue does not apply merely to Truth-in-Lending cases; it arises whenever an individual, affected by a violation of federal law, accepts the Congressional invitation to vindicate

it.

II.

THERE IS A CONFLICT WITHIN THE PRESENT FIFTH CIRCUIT (SOON TO BECOME THE NEW FIFTH AND ELEVENTH CIRCUITS). This could be inferred from the fact that 24 judges in the old Fifth Circuit are evenly split on the question; the tension has, in recent days, been heightened by the opinion of "Unit B" (the soon-to-be Eleventh Circuit) in Lacy v. General Finance Corporation, _____ F.2d _____ (5th Cir., July 27, 1981). Lacy is factually different, because the borrower there lost on the state law counterclaim (although she won the Truth-in-Lending claim). But, in very sweeping language, the Lacy court implied that the plaintiff could never be awarded attorney's fees for litigating the counterclaim no matter how meritless. And what the Lacy court said collides directly with what the panel opinion below said. So we can infer that, when the circuits are split, the new Fifth Circuit will adopt the panel opinion in this case (favoring plaintiffs), while the new Eleventh Circuit will adopt the ruling in Lacy,

favoring defendants. This conflict should be resolved before it creates more confusion than already exists.

III.

THE RULING BELOW CONFLICTS WITH A RULING BY THE TENTH CIRCUIT. That ruling was in Fleet Investment Co. v. Rogers, 620 F.2d 692 (10th Cir., 1980). Fleet Investment involved another federal consumer protection statute with substantially identical attorney's fee provisions: The Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §1981, et seq. The MVICSA, like the TILA, provides for an award "in the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney's fees as determined by the court". 15 U.S.C. §1989(a)(2). And the Tenth Circuit, in upholding a substantial award of attorney's fees, noted that the appellant "brought upon himself the resulting increase in plaintiff's attorney's fees by raising specious defenses and a substantial but unsuccessful counterclaim at trial." 620 F.2d at 793 [emphasis added]. Fleet Investment might be

reconciled with Lacy, but it squarely conflicts with the result here: one case or the other is wrong.

IV.

THE RESULT BELOW CONFLICTS WITH THIS COURT'S DECISION IN NEW YORK GASLIGHT CLUB INC. V. CAREY, _____ U.S._____, 100 SCt. 2024 (1980). In a way, the situation in New York Gaslight was the converse of what we have here: there, the plaintiff had to litigate her federal claims in state court in order to vindicate them, and here, the plaintiff had to litigate meritless state claims in order to prevail in her federal right of action.[1/] But what the Court said applies exactly here:

> [I]t is clear that one of Congress' primary purposes in enacting this section was to "make it easier for a plaintiff of limited means to bring a meritorious suit." [cit.] Because

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If Mrs. Lawrence had not litigated the counterclaim, she would have lost it by default; and, instead of winning $685.30 from Credithrift, she would have ended up owing it $699.07.

> Congress has cast the Title VII plaintiff in the role of a "private attorney general," vindicating a policy "of the highest priority," a prevailing plaintiff "ordinarily is to be awarded attorney's fees in all but special circumstances" [cit.] It is clear that Congress intended to facilitate the bringing of discrimination complaints. Permitting an attorney's fee award to one in respondent's situation furthers this goal, while a contrary rule would force the complainant to bear the costs of mandatory state and local proceedings and thereby would inhibit the enforcement of a meritorious discrimination claim.
>
> 100 SCt. at 2030 - 2031.

The Truth-in-Lending Act has a similar remedial purpose; see Mourning v. Family Publications Service, Inc., 411 U.S. 356, 363 - 370, 93 SCt. 1652, 1657 - 1660, 36 LEd.2d 318 (1972). Here, as in the employment discrimination case, Congress has provided for attorney's fees for successful plaintiffs affected by violations of federal law. In order to vindicate

the federal rights, the plaintiff, in each case, had to do more than litigate the federal question in federal court. In New York Gaslight, she had to litigate the federal question in state court also. Here, she had to litigate a state law question in order to obtain judgment on her federal claim. In both cases, all of the litigation was necessary in order to vindicate the federal claim. If the "state" aspects had not been litigated (that is, if the plaintiff's attorney had ignored the "state" portions in either case), the federal claim would effectively have been lost. And, in each case, if the attorney is not paid for litigating the "state" portion, less than full attorney's fees are paid, and less than full justice done.

The panel below was right: New York Gaslight controls here.

V.

THE LANGUAGE OF THE STATUTE REQUIRES AN AWARD OF ATTORNEY'S FEES FOR THE ENTIRE "ACTION." The statutory award includes

> In the case of any successful action to enforce the foregoing liability, the costs of the action, together

with a reasonable attorney's fee as determined by the court.

The word "action" is used in Rule 1 of the Federal Rules of Civil Procedure; it clearly comprises the entire case, including counterclaims. Other appellate decisions buttress this interpretation. For example, the "action" for which attorney's fees are awardable includes those aspects of the complaint which ultimately do not prevail; see McGowan, supra. It includes all of the myriad defenses an imaginative defendant might raise; see Starks v. Orleans Motors, Inc., 372 F.Supp. 928 (E.D., La., 1974), aff'd 500 F.2d 1182 (5th Cir., 1975). It includes the fight over attorney's fees; see Johnson v. State of Mississippi, 606 F.2d 631 (5th Cir., 1979). It includes work done on appeal; see Thomas v. Myers-Dickson Furniture Co., 479 F.2d 740 (5th Cir., 1973). And it has been held to include time spent to obtain dismissal of a counterclaim (in a Truth-in-Lending case) when the federal court lacks jurisdiction over it; see Russell v. Credithrift of America, Inc., Civil Action No. 17918 (N.D., Ga., Moye,

J., 1973). The counterclaim here, like the unsuccessful contentions in Mcgowan, the multiple defenses in Starks, the fight over fees in Johnson, and the appeal in Thomas, was something that Mrs. Lawrence had to deal with in order to win and the decision to litigate was certainly part of the defendant's effort to make the litigation unsuccessful (or at least less inviting).

At this point, it is helpful to look at the ruling in Lacy, supra. The Lacy court held that the borrower "misreads the Statute. It plainly provides that attorney's fees may be awarded if they are incurred to enforce the foregoing liability.' 'Foregoing liability' refers to the claims established by TILA; a plaintiff is not enforcing a TILA liability when he or she is defending against a state law debt claim." (Lacy v. General Finance Corp., _____ F.2d at _____, sl.op. at 9666). The Lacy court is incorrect: the plaintiff is "enforcing the foregoing liability" throughout the prosecution of the action, including the counterclaim; if she flinches when the counterclaim appears, she does not "enforc[e] the [] liability"; she loses.

VI.

POLICY REASONS DEMAND THAT THE JUDGMENT BELOW BE REVERSED. This point has best been made by the panel below:

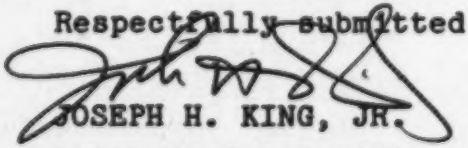
"Appellee has pointed to two reasons for denying attorney's fees for time spent defending the counterclaim. First, it points out that Congress has not stated explicity that time spent defending the counterclaim is compensable. Second, it argues that plaintiffs themselves can be fairly asked to pay their own attorney's fees if they prevail in defeating the counterclaim. These contentions ignore the fact that Congress has provided that a reasonable attorney's fee will be awarded a successful TILA plaintiff. If the defense of a compulsory counterclaim is one obstacle on the path to recovery under the TILA, we perceive no unreasonableness in compensating plaintiff's attorney for time so spent. To deny compensation would be inconsistent with the Congressional policy of implementing enforcement of the [TILA]. McGowan v. Credit Center of North Jackson, Inc., 546 F.2d 73, 77 (5th Cir. 1977), and would ignore our principle of construing the TILA liberally in favor

of the consumer, see Thomas v. Myers-Dickson Furniture Co., 479 F.2d 740, 748 (5th Cir. 1973). Because the attorney would be compensated for less than all of the time reasonably spent prosecuting the suit, his effective hourly compensation would be less than the reasonable value of his time as determined by the court. This would discourage potential plaintiffs and their attorneys from bringing suits to vindicate TILA rights. Cf. McGowan, supra (plaintiff successful on only one of several TILA claims awarded attorney's fees for all claims); see also New York Gaslight Club v. Carey, _____ U.S._____, 100 S.Ct. 2024, 64 L.Ed.2d _____(1980) (attorney's fees under Title VII)." Lawrence v. Credithrift of America, Inc., 622 F.2d 1307, 1309.

CONCLUSION

The issue is important because the ruling below would deter litigation that Congress sought to encourage. This Court should intervene to eliminate a conflict in rulings before confusion spreads.

Respectfully submitted,



JOSEPH H. KING, JR.
Attorney for Petitioner

APPENDIX

Beverly Lawrence, a/k/a Mrs. James Lawrence, Plaintiff-Appellant, v. Credithrift of America, Inc., Defendant-Appellee.

No. 78-2766.

United States Court of Appeals, Fifth Circuit.

May 8, 1981.

Appeal from the United States District Court for the Northern District of Georgia; Richard C. Freeman, Judge.

Before GODBOLD, Chief Judge, and BROWN, AINSWORTH, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAMUEL D. JOHNSON, THOMAS A. CLARK, and WILLIAMS, Circuit Judges.*

PER CURIAM:

The court en banc reinstates and adopts the concluding paragraph from the panel opinion, 622 F.2d 1207, at 1209, which was vacated by taking this case en banc. That portion of the opinion of the district

court which denies plaintiff recovery of attorney's fees for time spent in defending the compulsory counterclaim is affirmed by an evenly divided court.

*Coleman, Circuit Judge, elected not to participate in the consideration or decision of this appeal.

Beverly Lawrence, a/k/a Mrs. James Lawrence, Plaintiff-Appellant, v. Credithrift of America, Inc., Defendant-Appellee.

No. 78-2766.

United States Court of Appeals, Fifth Circuit.

October 7, 1980

Appeal from the United States District Court for the Northern District of Georgia; Richard C. Freeman, Judge.

ON PETITION FOR REHEARING
AND PETITION FOR REHEARING
EN BANC

(Opinion Aug. 4, 1980, 5 Cir., 622 F.2d 1207).

Before COLEMAN, Chief Judge, and BROWN, AINSWORTH, GODBOLD, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK, and WILLIAMS, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of

the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc on briefs without oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

Beverly LAWRENCE, a/k/a Mrs. James Lawrence, Plaintiff-Appellant, v. Credithrift of America, Inc., Defendant-Appellee.

No. 78-2766.

United States Court of Appeals, Fifth Circuit.

August 4, 1980

In action under the Truth-in-Lending Act, appeal was taken from judgment of the United States District Court for the Northern District of Georgia, at Atlanta, Richard C. Freeman, J. The Court of Appeals held that successful plaintiff was entitled to attorney fees for attorney's time spent defending defendant's compulsory counterclaim on the underlying debt.

Reversed in part and remanded.

Appeal from the United States District Court for the Northern District of Georgia.

Before GOLDBERG, CHARLES CLARK and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

This is an action under the Truth-in--Lending Act ("TILA"), 15 U.S.C. §1601 et seq. We are asked to decide whether a successful plaintiff is entitled to attorney's fees for attorney's time spent

defending defendant's compulsory counterclaim[1/] on the underlying debt. The relevant statute states that the creditor is liable to the debtor "in the case of any successful action to enforce [civil liability under the TILA]" for "the costs of the action together with a reasonable attorney's fee as determined by the Court." 15 U.S.C.A. §1640(a)(3) (West Supp. 1979). The question is thus whether a "reasonable attorney's fee includes compensation for time spent defending a compulsory counterclaim.

Appellee has pointed to two reasons for denying attorney's fees for time spent defending the counterclaim. First, it points out that Congress has not stated explicity that time spent defending the counterclaim is compensable. Second, it argues that plaintiffs themselves can be fairly asked to pay their own attorneys' fees if they prevail in defeating the counterclaim. These contentions ignore

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See Plant v. Blazer Financial Services, Inc. of Georgia, 598 F.2d 1357 (5th Cir., 1979).

the fact that Congress has provided that a reasonable attorney's fee will be awarded a successful TILA plaintiff. If the defense of a compulsory counterclaim is one obstacle on the path to recovery under the TILA, we perceive no unreasonableness in compensating plaintiff's attorney for time so spent. To deny compensation "would be inconsistent with the Congressional policy of implementing enforcement of the [TILA]". McGowan v. Credit Center of North Jackson, Inc., 546 F.2d 73, 77 (5th Cir. 1977), and would ignore our principle of construing the TILA liberally in favor of the consumer, see Thomas v. Myers-Dickson Furniture Co., 479 F.2d 740, 748 (5th Cir. 1973). Because the attorney would be compensated for less than all of the time reasonably spent prosecuting the suit, his effective hourly compensation would be less than the reasonable value of his time as determined by the court. This would discourage potential plaintiffs and their attorneys from bringing suits to vindicate TILA rights. Cf. McGowan, supra (plaintiff successful on only one of several TILA claims awarded attorney's fees for all claims); see also New York Gas-

light Club v. Carey, _____ U.S._____, 100 S.Ct. 2024, 64 L.Ed.2d _____(1980) (attorney's fees under Title VII).

The court below held that TILA plaintiffs cannot recover attorney's fees for time spent defending compulsory counterclaims. This issue must be remanded for a determination of a reasonable attorney's fee in light of the factors set forth in Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974).

The other issues presented by this appeal do not require lengthy discussion. Plaintiff's contention that a penalty of twice the finance charge, rather than the statutory minimum of $100, is required even if the loan agreement is void ab initio is sustained by our recent decision in Williams v. Public Finance Corp., 598 F.2d 349 (5th Cir. 1979). We also agree with plaintiff that interest should run from the date of entry of the original judgment, March 31, 1977. See Lew Wenzel & Co. of Southern California, Inc. v. London Litho Supply Co., Inc., 563 F.2d 1367 (9th Cir. 1977).

REVERSED in part and REMANDED.

United States District Court, Northern District of Georgia.

Beverly Lawrence vs. Credithrift of America, Inc., Civil Action No. 76-622A.

Filed: March 22, 1978.

This Truth-in-Lending action, 15 U.S.C. §1601 et seq., has been resubmitted on the sole issue of availability of an attorney's fee award for successful defense of the compulsory counterclaim on the validity of the underlying note, Mims v. Dixie Finance Corp., 426 F. Supp. 627 (N.D. Ga. 1970). No attorney's fee award may be recovered for this defense, Clifford Smith v. US Life Credit Corp., C75-1215A (N.D. Ga. July 27, 1977), and thus plaintiff's final claim is hereby DENIED.

IT IS SO ORDERED.

This, the 21 day of March, 1978.

RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

ORDER

In The United States District Court, Northern District of Georgia, Atlanta Division.

Clifford A. Smith v. USLIFE Credit Corporation, Civil No. C75-1215A.

Filed: July 27, 1977.

This truth-in-lending action is before the court on the recommendation of the special master of June 20, 1977, that plaintiff be granted summary judgment on defendant's counterclaim and that final judgment be entered for plaintiff in the amount of $714.16 as a civil penalty and $275.00 in attorney's fees plus all costs of the action. The special master in his recommendation states that defendant has conceded that the loan is unenforceable directly or indirectly. Accordingly, it is apparent that the recommendation of the special master that the plaintiff be granted summary judgment on the counterclaim should be adopted by the court. Defendant argues that inasmuch as the loan is null and void and unenforceable, no truth-in-lending penalty can be predicated on it. But, as the special master points out, this argument

was rejected by this court in Jerkins v. Public Finance Corp., Civil No. C76-401A (N.D. Ga., Jan. 12, 1977). See also Pinkett v. Credithrift of America, Inc., No.2, 430 F. Supp. 113 (N.D. Ga. 1977). Defendant objects to the recommendation of the special master on the basis that the special master's reliance upon Pinkett is erroneous. It is obvious that the defendant's argument is not well taken.

Plaintiff moves that the court accept in part and modify in part the recommendation of the special master. Plaintiff objects to that portion of the recommendation which suggests an attorney's fee in the amount of $275.00, arguing that this amount does not take into consideration the time spent in plaintiff's successful defense against defendant's counterclaim. On May 11, 1976, this court entered an order in which plaintiff was granted summary judgment on his truth-in-lending claim and awarded $714.16 civil penalty. Judgment was not entered at that time because the case was returned to the special master for his recommendation as to attorney's fees. On June 4, 1976, plaintiff's attorney submitted an

affidavit itemizing 5.5 hours time spent on the case and requesting attorney's fees in the amount of $275.00. On September 2, 1976, the court granted defendant's motion to amend and add counterclaim. The court ruled that defendant's motion to add a counterclaim for the underlying loan obligation should be granted because of this court's recent decision in Mims v. Dixie Finance Corp., 426 F. Supp. 627 (N.D. Ga. 1976).

The court accepts the recommendation of the special master that attorney's fees in the amount of $275.00 should be granted the plaintiff. Plaintiff argues that it was necessary that he defend against the compulsory counterclaim in order that he recover any judgment at all. Therefore, plaintiff contends, it is only reasonable that the attorney's fees incurred in the successful defense against the counterclaim should be awarded. Plaintiff cites the court several cases which reiterate the importance of attorney's fees in furthering the goals of the Truth in Lending Act. Among the decisions which plaintiff cites is McGowan v. Credit Center of North Jackson, Inc., 546 F.2d 73

(5th Cir. 1977). In McGowan the Fifth Circuit found that plaintiff was entitled to attorney's fees incurred in defending against an appeal. The situation in which a district court ruling on the truth-in-lending claim was appealed is obviously distinguishable from the situation in which a counterclaim is brought to recover a principal amount due on a loan governed by state law. In the case of the appeal, it is obvious that the work undertaken by the attorney is part and parcel of the original claim brought under the Truth in Lending Act. In the case of a counterclaim for the principal amount of a loan governed by the Georgia Industrial Loan Act, on the other hand, it is clear that the counterclaim is based on a state cause of action although it is allowed to be brought as a compulsory counterclaim to the federal truth-in-lending claim on the basis of the Mims decision. Plaintiff also cites the decision of this court in Russell v. Credithrift of America, Inc., Civil No. 17918 (N.D. Ga., Oct 12, 1973). In Russell the court found that plaintiff was entitled to attorney's fees for time spent defending defendant's counterclaim

over which the court declined to exercise pendent jurisdiction. Russell can be distinguished from the case at hand inasmuch as in Russell the merits of the counterclaim were never reached, and the time spent by plaitiff's attorney was time spent clarifying the status of a counterclaim in relation to truth-in-lending law. The jurisdiction of the court over such a counterclaim has now been decided by this court's decision in Mims, and in the case before us time spent by the plaintiff's attorney was spent defending against the merits of defendant's counterclaim. Although it is quite clear that plaintiff is entitled to an award of attorney's fees for time spent by his attorney in the successful prosecution of his truth-in-lending claim, it is equally clear that plaintiff cannot recover attorney's fees for time spent defending against a claim based entirely on state law and for which he would not ordinarily be entitled to attorney's fees. Accordingly, the court accepts the recommendation of the special master that plaintiff be awarded the $275.00 which his attorney stated by affidavit of June 4,

1976, that he had spent in the successful prosecution of the truth-in-lending claim.

The final matter before the court in this case is whether the special master's recommendation that the plaintiff be granted civil penalty in the amount of $714.16 should be accepted by the court. This was the amount of the original award which was made by the court after its finding of liability on the truth-in-lending claim in May of 1976. This court has held in Jerkins v. Public Finance Corp., Civil No. C76-401A (N.D. Ga., Jan. 12, 1977), that when the underlying loan is found to be null and void under the Georgia Industrial Loan Act, the only possible penalty for a violation of the federal Truth in Lending Act is the minimum statutory penalty of $100.00. This is true because if the underlying loan is found to be void, no finance charge exists, and twice zero can only equal zero. In this case, prior to the imposition of the defendant's counterclaim, the court had already awarded an amount equal to twice the finance charge as a civil penalty against the defendant for violation of the Truth

in Lending Act. Having already made the award before allowing defendant to counterclaim on the basis of the then recent decision in Mims, it would be unfair to now reduce the award merely because defendant was allowed to bring a counterclaim which was ultimately defeated by the plaintiff. Accordingly, the court accepts the special master's recommendation that the original award of a civil penalty in the amount of $714.16 should be allowed to stand.

The clerk shall enter judgment accordingly.

IT IS SO ORDERED this 27th day of July, 1977.

WILLIAM C. O'KELLEY
United States District Judge

ORDER

In The United States District Court, Northern District of Georgia, Atlanta Division.

Beverly Lawrence v. Credithrift of America, Inc., Civil Action No. 76-622A.

Filed: December 16, 1977

This Truth-in-Lending action, 15 U.S.C. §1601, et seq., is once more before the court on objections to the Special Master's Report and Recommendation. The defendant has moved for reconsideration of the "security interest" finding by the Special Master claiming that Anthony v. Credithrift of America, Inc., C.A. No. 75-2008A (N.D. Ga. 1977) should not be controlling and, if it is, its dictates were followed as closely as practicable under the circumstances. Plaintiff moves to adopt, in part, and objects, to the Report and Recommendation of the Special Master. Plaintiff requests that the court adopt that portion of the report which recommends that plaintiff prevail on the "security interest" violation. Plaintiff, on the other hand, objects: (1) to the recommendation that plaintiff not prevail on the "requirement of insurance"

claim;/[1] and (2) to the recommendation declining an award of attorney's fees to plaintiff for successful defense of the compulsory counterclaim on the alleged default on the loan repayment.

Having read and considered the original and supplemental Reports and Recommendations of the Special Master, the court approves and adopts that portion which reports and recommends that plaintiff prevail on the "security interest" issue. The Special Master's findings and conclusions on this issue are well-founded in consideration of the explicit language of the Act, 15 U.S.C. §1640(b), and the previous holding of this court, Anthony v. Credithrift of America, Inc., Civil Action No. 75-2008A (N.D. Ga. 1977) (Hill, J.). The court relies on the Special Master's findings of fact that the plaintiff's purchase of credit insurance was not unlawfully required by defendant as a prerequisite to granting the loan. The court concludes that no additional violation has thus been established beyond those infractions already found in the previous Reports and Recommendations of the Special

Master, filed September 21, 1976, December 13, 1976, June 30, 1977, and August 22, 1977, and subsequently approved and adopted by orders of this court entered December 3, 1976, March 28, 1977, and June 2, 1977. No additional statutory penalties should thus be imposed.

The remaining objection of plaintiff challenges the Special Master's denial of an award of attorney's fees to plaintiff for successful defense of defendant's counterclaim, the alleged default on the underlying loan, which was interpreted as a compulsory counterclaim by this court in Mims v. Dixie Finance Corp., 426 F.Supp. 627, 630 (N.D. Ga. 1976). Decision on this objection is DEFERRED as reconsideration of this issue by the entire court may be warranted.

IT IS SO ORDERED.

This, the 16th day of December, 1977.

RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

1/

Plaintiff has waived her objections to the Special Master's recommendation upon consideration of the expense projected for the preparation of a transcript necessary to support this objection.

RECOMMENDATION OF SPECIAL MASTER

In The United States District Court, Northern District of Georgia, Atlanta Division.

Beverly Lawrence, a/k/a Mrs. James Lawrence, Plaintiff, v. Credithrift of America, Inc., Defendant, Civil Action No. C76-622A

Trial was held on the issue of the voluntariness of credit insurance. This special master finds as a fact that plaintiff did not prove by a preponderance of the evidence that credit insurance was required. The loan in question was the first of its kind made by plaintiff and her husband. They were not familiar with credit insurance.

The loan manager gave them details of the various types of insurance and informed them that it was voluntary. Whatever questions plaintiff and her husband might have had were not clearly expressed. They never stated to the loan manager that they did not want the insurance. They correctly perceived that the insurance purchase was required in order to have death and disability benefits. But plaintiffs' perception that they had to pur-

chase the insurance in order to get the loan was only an assumption.

From the testimony of defendant's loan manager, the court finds that defendant tries to sell credit insurance but does not force it on borrowers, who, after having the insurance explained, state that they do not want it. That would make a dissatisfied customer and defendant would not want to make loans that would cause the borrower to be dissatisfied from the beginning. That would be bad business.

Therefore, the civil penalty received by plaintiff should be only twice the disclosed finance charge, or $685.30. The attorney's fee award of $850.00 should be maintained. That award includes some probably uncompensable time defending the counterclaim. But it excludes some perhaps compensable time spent after remand, including the trial on the issue of the voluntariness of credit insurance.

Wherefore it is recommended that plaintiff have final judgment for a civil penalty of $685.30, together with an attorney's fee of $850.00.

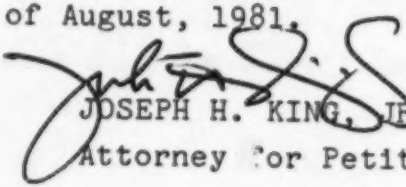
This 18th day of August, 1977.

EZRA H. COHEN
BANKRUPTCY JUDGE, Sitting as
Special Master

CERTIFICATE OF SERVICE

I hereby certify that I have served opposing counsel, Kirby G. Bailey, Esq., 2571 Snapfinger Road, Decatur, Georgia 30034, with three copies of this petition by U.S. Mail, first class, postage prepaid.

This 6th day of August, 1981.



JOSEPH H. KING, JR.
Attorney for Petitioner

Opposition

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

NUMBER 81-282

October Term, 1981

BEVERLY LAWRENCE,

Petitioner,

vs.

CREDITHRIFT OF AMERICA, INC.,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

W. RHETT TANNER
KIRBY G. BAILEY

ATTORNEYS FOR RESPONDENT

Of Counsel:

HANSELL, POST, BRANDON & DORSEY
3300 First National Bank Tower
Atlanta, Georgia 30383
404/581-81[illegible]

BAILEY & BORCHER
2571 Snapfinger Road
Decatur, Georgia 30034
404/987-3322

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Certificate of Service

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II. OPINION BELOW

The Appendix of the Petitioner contains certain of the appropriate lower court decisions. It does not include a lower court opinion dealing with Respondent's counterclaim; but that is not important at this time since the issue in the Petition may be resolved without it. Respondent would further note that the opinion in Smith v. USLife Credit Corporation, appearing at page 10 of the Appendix to the Petition is not an "opinion below" in this cause.

III. JURISDICTION

Respondent does not believe this case is appropriate for the Writ, but takes no exception to Petitioner's jurisdictional statement.

IV. QUESTION PRESENTED

The Question stated by Petitioner is not accurate. The Petitioner did prevail on the Truth-in-Lending (herein called "TIL") claim, and was awarded the statutory penalty plus reasonable attorneys fees for work done on the TIL claim. It was not necessary for petitioner to "defeat" the state law counterclaim to obtain this result. Even had the counterclaim been successful, Petitioner's TIL claim nevertheless would have been successful.

The difference would have been an adjustment in the amount of the ultimate judgment by appropriate offsets. Further, resolution of the issue does not depend on whether the state law debt counterclaim was successful or not.

The Question properly presented is this:

Does the Truth-in-Lending Act authorize an award of attorneys fees based on work done by the TIL claimant's attorney in defending a state law claim, where state law does not authorize such award, merely because the state claim is litigated in the same proceeding as the TIL claim?

V. STATUTE INVOLVED

Respondent has nothing to add here.

VI. STATEMENT OF THE CASE

Petitioner's statement is not accurate in that it does not clearly advise that Petitioner was awarded $685.30 statutory damages under TIL (not $100.00); and reasonable attorneys fees (not "partial attorneys fees"). Respondent has no objection to the remainder of the statement.

Respondent would note that the loan contract here was deemed "null and void", and a forfeiture was worked because that was the penalty under the Georgia Industrial Loan Act in 1978, resulting from the holding by the Supreme Court of Georgia in

Hodges v. Community Loan & Investment Corporation, Inc., 234 Ga. 427, 262 S.E. 2d 457 (1976). The Hodges case, however, was overruled on the forfeiture point by the Supreme Court of Georgia in 1980, the result being that the lender is always entitled to his principal. Ector v. Southern Discount Co., 246 Ga. 30, 268 S.E.2d 621 (1980). Further, in 1980, the Georgia Industrial Loan Act was amended to eliminate the "forfeiture" result, except in cases of willfulness, Ga. Code Ann. §25-9903; Acts 1980, pg. 1784. Therefore, a case precisely such as that at bar, where the creditor was completely unsuccessful in his counterclaim, is not likely to recur. The Lacy case, infra, involves a successful counterclaim, and is the more likely scenario.

VII. REASONS FOR DENYING THE WRIT

The Writ should be denied for these reasons:

1. There is no "conflict" in the circuits -- either actual or "inchoate".

2. The "potential" conflict Petitioner asserts concerning "dozens of federal statutues" does not now exist, and is not likely ever to exist. There is no reason for the Court to act until it does.

3. The ruling below is correct under Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1504, 44 L.Ed 2d 29 (1975).

VIII. DISCUSSION

1. There is no "conflict" in the circuits -- either actual or "inchoate".

The Fifth Circuit has, since this case was decided, as noted by Petitioner, reached the same result in a unanimous panel decision in Lacy v. General Finance Corporation, ___F.2d___ (July 27, 1981). *

A copy of the slip opinion in Lacy is attached for the convenience of the Court.

To assume that the Fifth Circuit, either now or after its division into the Fifth and Eleventh Circuits, will not follow Lacy is speculation; and presumes that court will not honor its own rule that panel precedents will be followed unless changed by the en banc court. The new Eleventh Circuit (effective October 1, 1981) has announced it will adhere to the same rule, and will follow old Fifth Circuit panel rulings. It, therefore, appears that controlling precedent has been established for both the Fifth and Eleventh Circuits, unless an en banc panel of either later decides otherwise. Respondent suggests that now is not the time to anticipate that a conflict could later appear.

---

*Georgia has applied the same rule as in this case and Lacy to a case in state court involving TIL. See Good Housekeeping Shops v. Hines, 150 Ga. App. 240, 250 S.E.2d 205 (1979).

Nor is there a conflict with the United States Court of Appeals for the Tenth Circuit. In Fleet Investment Co. v. Rogers, 620 F.2d 692 (10th Cir. 1980), the Court was concerned with the "odometer" act (Motor Vehicle Inspection and Cost Saving Act, 15 USC §1981-1991) which is a different statute, enacted for different purposes, and which involves substantially different considerations -- not the least of which is that it, unlike TIL, involves concepts of "fraud". The mention by the Tenth Circuit of the counterclaim was dictum. The questions decided were 1) whether the amount of recovery in an "odometer" case limits the attorney fee award; and 2) whether the award could be limited to the amount of the fee agreement between the plaintiff and his counsel.

2. The "potential" conflict Petitioner asserts concerning "dozens of federal statutes" does not now exist, and is not likely ever to exist. There is no reason for this Court to act until it does.

Petitioner's contention that a "potential" conflict exists "in connection with dozens of federal statutes" is speculative to say the least; and is based on a presumption that the text, law, and policy governing each in this multitude of federal statutes is the same. It is more likely that, under the guidance of this Court in Alyeska Pipeline

Service Co., Inc., supra, the lower courts will be able to apply the "American Rule" to each of these separate statutes individually and in an orderly fashion, as the issues properly rise for adjudication. We respectfully submit that this Court should not presume that the lower courts will not do so.

3. The ruling below is correct under Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1505, 44 L.Ed.2d 29 (1975).

The "American Rule" as the standard for determining the propriety of attorneys fee awards in the federal court was pronounced by this Court in Alyeska Pipeline Service Co. v. Wilderness Society, supra. That rule is that attorneys fees are not allowable absent "specific and explicit provisions for the allowance of attorneys fees under selected statutes granting or protecting various federal rights." 421 U.S., page 260.

The debt counterclaim here was pursuant to Georgia law. That law prohibits allowance of attorneys fees, except in extreme cases. Ga. Code §20-1404. A defendant (including a plaintiff defending a counterclaim) is not permitted attorneys fees even under this statute. King v. Pate, 215 Ga. 593, 112 S.E.2d 589 (1960); Pitman v. Dixie Ornamental Iron Co., 122 Ga. App. 404; 177

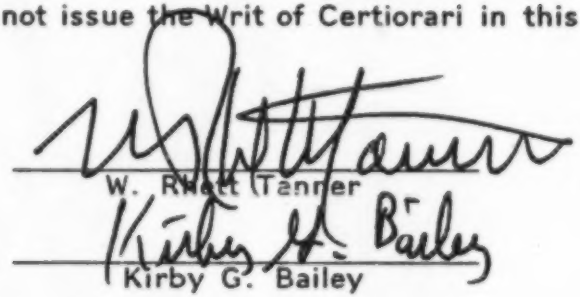
S.E.2d 167 (1970); Hickman v. Frazier, 128 Ga. App. 552, 197 S.E.2d 441 (1973). Nothing in the TIL Act's attorneys fee authorization indicates any Congressional intent to override state law on this issue. Indeed, the TIL Act has a specific limitation on its effect on state law: "This title does not otherwise anull, alter, or affect in any manner the meaning, scope or applicability of the laws of any state . . . " 15 USCA §1610.

Petitioner did not have to "overcome" or "defeat" the state law debt claim to prevail on the TIL claim. Regardless of the merit of the state law debt claim, Petitioner would have been successful on TIL and would have been awarded the statutory damages plus reasonable attorneys fees. Had the state law debt claim been successful the result would not have been to "defeat" the TIL claim. Instead, the amounts awarded the Petitioner on the TIL claim and the amount awarded Respondent had its state law debt claim been successful would have been to offset one against the other --and Petitioner would still have been awarded a reasonable attorneys fee. And, a litigant in the position of Petitioner below (particularly under Georgia law as it now stands, where the forfeiture rule has been repealed, so that the creditor will always have a cause of action where the debtor defaults), could avoid any counterclaim by paying his debt in accordance with its terms, and not face litigation on the counterclaim.

The district court was correct. The state law prohibiting an allowance of attorneys fees is properly applicable. There is no "specific", "explicit" authorization in TIL otherwise. Indeed, TIL by its terms limits its effect on state laws.

IX. CONCLUSION

Respondent respectfully submits that this Court should not issue the Writ of Certiorari in this cause.



W. Rhett Tanner

Kirby G. Bailey

ATTORNEYS FOR RESPONDENT

OF COUNSEL:

HANSELL, POST, BRANDON & DORSEY
3300 First National Bank Tower
Atlanta, Georgia 30383
404/581-8174

BAILEY & BORCHER
2571 Snapfinger Road
Decatur, Georgia 30034
404/987-3322

Betty Ann LACY, Plaintiff-Appellant,

v.

GENERAL FINANCE CORPORATION, Defendant-Appellee.

No. 80-7213.

United States Court of Appeals, Fifth Circuit. Unit B

July 27, 1981.

Borrower brought suit for alleged violation of Truth in Lending Act and lender counterclaimed for balance due. The United States District Court for the Northern District of Georgia, Robert L. Vining, Jr., J., entered judgment and borrower appealed. The Court of Appeals, James C. Hill, Circuit Judge, held that borrower, even though she prevailed in her TILA claim, was not entitled to award of attorney's fee for defending counterclaim and that award of fee was sufficient.

Affirmed.

1. Secured Transactions ⇐231

Under Georgia Law, a creditor must perform in good faith its obligations in disposing of collateral. Ga.Code, § 109A-9-504(1, 3).

2. Consumer Credit ⇐66

Georgia's Motor Vehicle Sales Finance Act was relevant to Truth in Lending Act suit by automobile purchaser against lender which counterclaimed for balance due on debt after it was repossessed and sold. Truth in Lending Act, § 102 et seq. as amended 15 U.S.C.A. § 1601 et seq.; Ga.Code, §§ 96-1001 et seq., 96-1007.

3. Secured Transactions ⇐230

Where lender sent required notice of repossession to address listed in papers covering financing of automobile purchase, even though notice was returned undelivered, lender was not required to send another notice to address where vehicle was in fact found. Ga.Code, §§ 96-1007, 109A-9-504.

4. Courts ⇐102(2)

Affirmance by evenly divided court has no precedential value.

5. Consumer Credit ⇐67

Phrase "foregoing liability" as used in Truth in Lending Act provision obligating creditor to pay all costs in successful suit to enforce provisions of the Act refers to claims established by the Act. Truth in Lending Act, §§ 130, 813(a)(3) as amended 15 U.S.C.A. §§ 1640, 1692k(a)(3).

See publication Words and Phrases for other judicial constructions and definitions.

6. Consumer Credit ⇐64

A party is not enforcing a Truth in Lending Act liability when defending against a state law debt claim. Truth in Lending Act, §§ 130, 813(a)(3) as amended 15 U.S.C.A. §§ 1640, 1692k(a)(3).

7. Consumer Credit ⇐32

Congress, by enacting Truth in Lending Act, created new claim for failure to disclose certain terms associated with extension of credit. Truth in Lending Act, § 102 et seq. as amended 15 U.S.C.A. § 1601 et seq.

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The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

8. Consumer Credit ⇐64

A borrower may properly and successfully pursue a Truth in Lending Act claim even though he has defaulted on underlying debt. Truth in Lending Act, § 102 et seq. as amended 15 U.S.C.A. § 1601 et seq.

9. Consumer Credit ⇐64

Voluntary release of debtor by creditor does not extinguish Truth in Lending Act claim. Truth in Lending Act, § 102 et seq. as amended 15 U.S.C.A. § 1601 et seq.

10. Consumer Credit ⇐64

Proof of liability for underlying debt is no defense to Truth in Lending Act claim. Truth in Lending Act, § 102 et seq. as amended 15 U.S.C.A. § 1601 et seq.

11. Consumer Credit ⇐64

A Truth in Lending Act claim may be won or lost regardless of outcome of claim for underlying debt and claim for underlying debt may be won or lost regardless of outcome of Truth in Lending Act claim. Truth in Lending Act, § 102 et seq. as amended 15 U.S.C.A. § 1601 et seq.

12. Consumer Credit ⇐32

When Congress enacted Truth in Lending Act, it added nothing to rights of parties vis-a-vis indebtedness created by credit transaction. Truth in Lending Act, § 102 et seq. as amended 15 U.S.C.A. § 1601 et seq.

13. Federal Civil Procedure ⇐777

Where borrower sued lender for alleged violation of Truth in Lending Act, lender's suit for balance due after sale of security was a compulsory counterclaim. Truth in Lending Act, § 102 et seq. as amended 15 U.S.C.A. § 1601 seq.

14. Consumer Credit ⇐67

Borrower who successfully asserted Truth in Lending Act claim against lender was not entitled to award of attorney fees in defense of counterclaim asserted by lender for balance due after foreclosure against security. Truth in Lending Act, § 130 as amended 15 U.S.C.A. § 1640.

15. Federal Civil Procedure ⇐2737

Contingent nature of fee is one factor to consider when evaluating adequacy of attorney's fee award.

16. Consumer Credit ⇐67

Attorney's fees awarded to successful Truth in Lending Act claimant were sufficient even though not enhanced because of contingent nature of recovery. Truth in Lending Act, § 130 as amended 15 U.S.C.A. § 1640.

Appeal from the United States District Court for the Northern District of Georgia.

Before HILL and FRANK M. JOHNSON, Jr., Circuit Judges, and SCOTT *, District Judge.

JAMES C. HILL, Circuit Judge:

Betty Ann Lacy bought a used car. General Finance Corporation agreed to lend her the balance of the purchase price. This mundane transaction has effected considerable litigation. First,

* District Judge of the Middle District of Florida, sitting by designation.

Lacy sued General Finance, alleging that the creditor had violated the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* (TILA). Eventually she prevailed, and General Finance no longer challenges her entitlement to damages. In the interim, however, Lacy also defaulted on the underlying loan. General Finance repossessed and sold the car, but the proceeds from the sale were insufficient to satisfy the remaining debt. So General Finance, while defending against Lacy's TILA claims, bought a compulsory counterclaim for the balance of the loan. A jury returned a verdict favorable to General Finance on the counterclaim. Lacy appeals and asks this court to consider three issues. We disagree with all of her contentions.

I.

[1] First, Lacy argues that General Finance is not entitled to recover any of the deficiency between the sale price of the car and the unpaid balance of the loan because it failed to reasonably notify her of the impending sale of the car. Georgia law governs our disposition of this argument. The Georgia commercial code permits a secured creditor to dispose of the collateral if the debtor defaults, but before the creditor can pursue a deficiency balance it must reasonably notify the debtor "of the time and place of any public sale or . . . of the time after which any private sale or other intended disposition is to be made . . . ." Ga.Code § 109A–9–504(1), (3). The code itself does not tell us what sort of notification is reasonable; Georgia case law emphasizes that a creditor must perform in good faith its obligations in disposing of the collateral. *See Geohagan v. Commercial Credit Corp.*, 130 Ga.App. 828, 204 S.E.2d 784 (1974).

[2] Because the thing financed here is a car, the provisions of Georgia's Motor Vehicle Sales Finance Act are also relevant. That Act provides, in part:

> When any motor vehicle has been repossessed after default . . ., the seller or holder shall not be entitled to recover a deficiency . . . unless within 10 days after said repossession he forwards by registered or certified mail to the address of the buyer shown on the contract, or later designated by said buyer, a notice of the seller's or holder's intention to pursue a deficiency claim against said buyer.

Ga.Code § 96–1007.

The record here reveals that General Finance complied with the requirements of the Motor Vehicle Sales Finance Act. It sent the statutorily required notification via certified mail to the address she provided in the finance contract. The post office returned the notification undelivered and marked "MOVED, LEFT NO ADDRESS." Lacy had not designated a forwarding address in the finance contract. General Finance made no other attempt to locate and notify Lacy. General Finance was able to locate the collateral at another address, however, and Lacy contends that even though nothing suggests that she could have been reached at that address General Finance ought to have sent notification to her there.

[3] We disagree. We think that § 96–1007 complements § 109A–9–504 and provides some guidance as to what constitutes reasonable notice in this case. Although we hesitate to dictate that Georgia law mandates that compliance with the requirements of § 96–1007 is enough to satisfy the requirements of § 109A–9–504 in every instance, we are

convinced that the jury had good reason to decide that General Finance reasonably notified Lacy of the impending sale of the car. Under facts of this case, we see no reason to reject the judgment of the jury.

II.

[4] Second, Lacy suggests that she should recover from General Finance the attorney's fees she incurred in defending against its counterclaim. We recently considered this very suggestion and, as an evenly divided en banc court, we affirmed a district court's holding which denied a TILA plaintiff's "recovery of attorney's fees for time spent in defending the compulsory counterclaim . . . ." *Lawrence v. Credithrift of America, Inc.*, 644 F.2d 506 (1981). An affirmance by an evenly divided court, however, has no precedential value, *see generally Hertz v. Woodman*, 218 U.S. 205, 213–14, 30 S.Ct. 621, 622–23, 54 L.Ed. 101 (1910), so we are required to explain here why we think Lacy should not recover the attorney's fees chargeable to her defense against the counterclaim.

[5, 6] Lacy premises her suggestion on 15 U.S.C. § 1640, which provides in pertinent part:

> (a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person in an amount equal to the sum of—
>
> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

See also id. § 1692k(a)(3). She argues that "the costs of the action" include the costs of defending against General Finance's counterclaim and thus that she, as a successful TILA plaintiff, is entitled to those costs. She misreads the statute. It plainly provides that attorney's fees may be awarded if they are incurred "to enforce the foregoing liability." "Foregoing liability" refers to the claims established by TILA; a plaintiff is not enforcing a TILA liability when he or she is defending against a state law debt claim.

[7–12] Congress, by enacting TILA, created a new claim for failure to disclose certain terms associated with the extension of credit. A borrower may properly and successfully pursue a TILA claim even though he has defaulted on the underlying debt. The voluntary release of the debtor by the creditor does not extinguish the TILA claim. Proof of liability for the underlying debt is no defense to the TILA claim. The TILA claim may be won or lost regardless of the outcome of a claim for the underlying debt; likewise, a claim for the underlying debt may be won or lost regardless of the outcome of the TILA claim. When Congress enacted TILA, it added nothing to the rights of the parties vis-a-vis the indebtedness created by the credit transaction. Congress did provide that the successful TILA claimant could recover attorney's fees incurred in prosecuting it. It did not provide attorney's fees for parties to any other claim or controversy.

[13] Undeniably, a TILA claim and a state law debt claim which concern the same loan are related. Both claims arise from one transaction. This relationship renders General Finance's claim on the underlying loan a compulsory counterclaim. *See Plant v. Blazer Financial Services Inc. of Georgia*, 598 F.2d 1357 (5th Cir. 1979). This relationship, how-

ever, does not transform the debt action into a TILA action.

Our interpretation of the statute is buttressed by the "American Rule" concerning the recovery of attorney's fees: "the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser." *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 95 S.Ct. 1612, 1616, 44 L.Ed.2d 141 (1975). There are, of course, exceptions to this general rule, but Congress has not

> extended any roving authority to the judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted. What Congress has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights.

Id. at 260, 95 S.Ct. at 1623. In enacting TILA, Congress clearly created an exception to this "American Rule," no doubt in order to encourage those with valid TILA claims to pursue them. In no way, however, did Congress specifically and explicitly provide for the allowance of attorney's fees incurred in the defense against a claim which did not arise under TILA.

[14] Accordingly, Lacy is not entitled to recover from General Finance any attorney's fees which were charged for time spent in defending against the company's counterclaim.

III.

[15, 16] Third, Lacy contends that the attorney's fees she properly recovered, that is, those incurred in the pursuit of her valid TILA claim, should be enhanced by one-third because of the contingent nature of the recovery. We recognize that the contingent nature of a fee is one factor to consider when evaluating the adequacy of an attorney's fee award. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974). We nevertheless believe that the amount awarded here is appropriate.

Thus the disposition of this case by the district court is

AFFIRMED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for all parties in the foregoing matter with a copy of this Response to Petition for Writ of Certiorari by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon. as follows:

Mr. Joseph H. King, Jr.
967 Juniper Street, N.E.
Atlanta, Georgia 30309

This 4th day of September, 1981.

ATTORNEY FOR RESPONDENT